Supreme Court, U.S.
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92-475

No. _____

In The

Supreme Court of the United States

October Term, 1992

BRENDA RESHA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fifth Amendment's indictment clause require that the grand jury make an individual determination of probable cause as to each specific defendant, so that the failure to do so where an indictment charges multiple defendants, causes the indictment to no longer be an indictment?

2. Does a defendant in a federal criminal case have a right to inspect the grand jury voting slip required by Rule 6(c) of the Federal Rules of Criminal Procedure, to determine whether or not a valid indictment has been voted against that defendant?

3. Did the Court of Appeals have jurisdiction to consider petitioner's interlocutory appeal under the "right not to be tried" exception set forth in *Midland Asphalt Corporation v. United States*, 489 U.S. 794 (1989)?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, Brenda Resha and the respondent, the United States of America.

Walter Cohen and Washington R. Butler, Jr. are co-defendants with Brenda Resha in the original indictment filed in the district court below, but were not parties to the appeal or to this petition.

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BRENDA RESHA,

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v.

UNITED STATES OF AMERICA,

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Petition For Writ Of Certiorari
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For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Brenda Resha, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in these proceedings on June 22, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not reported and is reprinted in the appendix hereto, App. 1, *infra*.

The opinion of the United States District Court for the Middle District of Tennessee is not reported and is reprinted in the appendix hereto, App. 3, *infra*.

JURISDICTION

The opinion of the panel of the Court of Appeals was filed June 22, 1992. Petitioner did not file a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The time for filing this petition is governed by 28 U.S.C. § 2101(e) and by this Court's Rule 13.1.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth Amendment right to be held to answer for a serious crime only upon the indictment of a grand jury. Pertinent portions of the Fifth Amendment to the Constitution of the United States provide:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury, . . . "
> " . . . nor shall any person . . . be deprived of life, liberty or property, without due process of law . . . "

STATUTORY PROVISION INVOLVED

The case involves 28 U.S.C. § 1291, which provides, in relevant part:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . "

FEDERAL RULES INVOLVED

This case involves Rules 6(c),(e) (2) and (6), and (f) of the Federal Rules of Criminal Procedure.

Rule 6(c), Federal Rules of Criminal Procedure, provides in relevant part:

> " . . . The foreperson or another juror designated by the foreperson shall keep record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court."

Rule 6(e)(2), Federal Rules of Criminal Procedure, provides in relevant part:

> " . . . an attorney for the government, or any person to whom disclosure is made under paragraph 3(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules."

Rule 6(e)(6), Federal Rules of Criminal Procedure, provides:

> "Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury."

Rule 6(f), Federal Rules of Criminal Procedure, provides in relevant part:

> "An indictment shall be found only upon the concurrence of 12 or more jurors."

STATEMENT OF THE CASE

The basis for federal district court jurisdiction in the first instance is 18 U.S.C. § 3231.

Petitioner, an independent contractor, and officials of two companies for which she performed bookkeeping services, were indicted by a federal grand jury and charged in one count of conspiring to violate Sections 1001, 657 and 1006 of Title 18, United States Code.

The factual allegations of the indictment are that defendant Walter Cohen obtained SBA-backed equity capital for corporations owned by economically disadvantaged persons through his company Tennessee Equity Capital Corporation (TECC), and in so doing, falsely stated that the corporations which were receiving the equity capital through TECC were "qualified investments" under 15 U.S.C. § 681 et seq. and 13 CFR 107. It is alleged that defendant Brenda Resha was designated as a bookkeeper or officer or bank account signatory for several of these corporations. The indictment also alleges that defendant Washington R. Butler, Jr., the economically disadvantaged president-owner of one of the corporations, lied about his knowledge of these matters to the federal grand jury. In addition to the single count of conspiracy, Walter Cohen was also indicted on five counts of violating 18 U.S.C. § 1001 and Washington R. Butler, Jr. was indicted on two counts of perjury in violation of 18 U.S.C. § 657. Resha was indicted only in a single conspiracy count.

Petitioner moved for access to the instructions given to the grand jury, for access to the record of the number of grand jurors concurring in the indictment (as required by Federal Rule of Criminal Procedure 6(c) and 6(f)) and

also moved to dismiss the indictment because of grand jury irregularities. Petitioner's motion to dismiss was based on the fact that the voting procedures used by the grand jury denied her the right to due process and the right to be held to answer only upon a finding of probable cause as to her individually.

The district court granted the motion for access to the instructions given to the grand jury (Order, the United States District Court for the Middle District of Tennessee, Case No. 3-92:00024, April 15, 1992). However, in a Memorandum Opinion, the district court denied the other motions (Memorandum, United States District Court for the Middle District of Tennessee, Case No. 3-92:00024, May 12, 1992, at App. 7).

In the district court's Memorandum Opinion, the court found that Petitioner had not made a sufficient showing of a need for disclosure of the grand jury voting slip and that such a showing was required to breach the secrecy imposed by Federal Rules of Criminal Procedure 6(e)2. Based on the court's *in camera* inspection of the Record of Grand Jurors Concurring, the district court was satisfied that no Fifth Amendment or Rule 6 violation occurred (Memorandum, App. 6). The district court also found "that there is no requirement either in Rule 6(f) or the Fifth Amendment that the grand jury take a separate vote as to each defendant on each count." (Memorandum, App. 5).

In response to the district court's order granting petitioner's motion for review of the instructions to the grand jury, the government provided a copy of the transcript of the proceedings before the grand jury on February 13,

1992, which was the date on which the indictment was voted by the grand jury. (Transcript, *In re: Federal Grand Jury Proceedings*, Panel 1, Testimony of Special Agent, Gerald Struchen, February 13, 1992, pp. 2-3, 31-32).

None of the testimony or proceedings before the grand jury on that date addressed Petitioner's actions or role in the charged offenses. The Special Agent who appeared with the Assistant United States Attorney briefly described documents which were being admitted (Transcript, pp. 3-6) and the Assistant United States Attorney read aloud the indictment (Transcript, pp. 7-24). The prosecutor offered to read aloud the statutes for which the indictment alleged violations – but when no grand juror specifically requested such a reading, the statutes were not read aloud or submitted in any other form (Transcript, pp. 24-26).

Some discussion took place concerning the actions of co-defendant Walter Cohen and co-defendant Washington Butler and the viability of some of the corporations described in the indictment (Transcript, p. 35).[1]

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[1] The special agent testified regarding documents signed by Walter Cohen which had previously been presented to the grand jury (Transcript, pp. 26-29). One grand juror asked a question concerning the reference in Count 2 of the indictment, which charges Mr. Cohen alone, to the use of the term "qualified investments" (Transcript, pp. 29-31).

A grand juror inquired as to why Mr. Butler was the only corporation president included in the indictment. In response, the special agent testified that the other presidents cooperated with and were truthful with the investigation (Transcript, pp. 32-33) and there were "no indications of intent to violate any laws by these people" (Transcript p. 33), and that Butler was

No reference was ever made to the Petitioner. Rather, the only reference to anyone other than Walter Cohen or Washington Butler was the following discussion:

> Q: If Washington Butler had not – Agent Struchen, if he had not concealed, or lied, or covered-up, then we would not have information that he had – then he would not be charged, is that correct?
>
> A: Right, that's true.
>
> GRAND JURY PERSON: All right then, what this is, this is just a conspiracy for Walter Cohen to, finance his own businesses through the SBA, the way its turned out is that – that's what we're saying?
>
> A: Yes, yes. He could . . .
>
> GRAND JURY PERSON: And these other people who know enough about it could be pulled in on the indictment?
>
> Q: There are acts that show that they either did willful and knowing acts in furtherance, or they did willful and knowing acts to conceal it, to cover-up. The conspiracy is a conspiracy to not only do the false statements but also to cover-up from investigating authorities and make false statements to the SBA?
>
> A: Yes, Sir, that is a good summary.

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named in the indictment for "his role in the cover-up" (Transcript pp. 33-34).

(Transcript, pp. 34-35).[2]

Thus, *no* instructions of law were given to the jurors. More importantly, the grand jurors were, by the collective vote, encouraged to find collective probable cause without separate evaluations of the evidence relating to individual proposed defendants and their actions and roles in the events charged.

Petitioner filed a timely Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. Petitioner filed the transcript of the February 13, 1992 grand jury colloquy with the district court as part of her Certificate Regarding Transcript and Record on Appeal.

The Sixth Circuit dismissed the appeal *sua sponte* for lack of appellate jurisdiction, citing Rule 9(b)(1) of the Rules of the Sixth Circuit.[3] In so acting, the Sixth Circuit held that under 28 U.S.C. § 1291, courts of appeals have jurisdiction only over final decisions of the district courts and therefore, in a criminal case, appellate review is prohibited until after conviction and sentencing. The Court further observed: "(g)enerally, a district court order denying a defendant's motion to dismiss an indictment is not immediately appealable under § 1291", citing *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989) and *United States v. Hollywood Motor Car Company. Inc.*, 458 U.S. 263 (1982). (Order, United States Court of Appeals for the Sixth Circuit, Case No. 925735, Order

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[2] The transcript does not indicate whether or not the special agent or the Assistant United States Attorney was the source of this summary quotation. However, the transcript court reporter generally identified the prosecutor's statements with "Q", the grand jury's statements with "GRAND JURY PERSON" and the special agent's with "A".

[3] This Rule allows disposition of an appeal without oral argument when a panel has unanimously determined that "the appeal is frivolous".

filed June 22, 1992, p.1, at App. 1). Petitioner now files this timely Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

A. The decision is in conflict with *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989).

In *Scales v. United States*, 367 U.S. 203 (1961), this Court observed:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantiated to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment . . .

367 U.S. at 224-225.

This case presents the important and unsettled question of whether the failure to ensure an *individual* determination by the grand jury, of probable cause that an individual defendant is guilty of a charged offense, gives rise to the "constitutional right not to be tried" defined in *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989).

This case also presents the important and unsettled question of whether *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989) authorizes the interlocutory appeal of (1) a district court order refusing to dismiss an indictment despite the absence of an individual determination by the

grand jury of probable cause to indict the Petitioner individually; and of (2) a district court order refusing to disclose whether or not a sufficient number of grand jurors have voted to concur in the issuance of the indictment.

In *United States v. Mechanik*, 475 U.S. 66 (1986), this Court ruled that a violation of the requirements of Rule 6(d) of the Federal Rules of Criminal Procedure was harmless when raised for the first time on an appeal after a conviction at trial, because "the petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted." 475 U.S. at 67. However, this Court specifically reserved the question "as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial." 475 U.S. at 72.

The collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), as enunciated in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), permits interlocutory appeal of certain types of orders where three criteria are met. In *Midland Asphalt Corp. v. United States*, this Court determined that the third prong of this test is satisfied where there exists "an explicit statutory or constitutional guaranty that trial will not occur." *Midland*, 489 U.S. at 801. This Court further ruled that the Grand Jury Clause of the Fifth Amendment confers such "a right not to be tried (in the pertinent sense) when there is no Grand Jury indictment." 489 U.S. at 801. While this Court ruled that "the common-law protections

traditionally associated with the grand jury" do not each give rise to "a right not to be tried", this Court held that "a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment" will give rise "to the constitutional right not to be tried", 489 U.S. at 802, and would thus be reviewable on an interlocutory appeal.

The Fifth Amendment's Grand Jury Clause requires that a person be put to trial only upon a presentment or indictment of a Grand Jury. Rule 6(f) of the Federal Rules of Criminal Procedure states that a valid indictment requires the concurrence of at least twelve jurors. *Midland Asphalt Corp.* suggests that there is a right not to be tried in the absence of a determination by the grand jury of probable cause as to the defendant held to answer. The Sixth Circuit held that interlocutory denials of motions to dismiss an indictment are not appealable, without regard to the basis for such motions. The Sixth Circuit thus incorrectly interpreted *Midland Asphalt Corp.*

B. The decision below is in conflict with a decision of the Tenth Circuit.

The Sixth Circuit's Order dismissing petitioner's appeal did not specifically refer to the substantive issues raised by her appeal, resulting in a holding that neither issue constitutes sufficient ground for an interlocutory appeal under the principles of *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). This holding is in direct conflict with the opinion of the Tenth Circuit in *United States v. Deffenbaugh Industries, Inc.*, 957 F.2d 749

(10th Cir. 1992), a case which was cited by Petitioner in the district court.

In *Deffenbaugh,* the Tenth Circuit held that denial of a motion for access to the record of the number of grand jurors concurring in an indictment is reviewable on appeal under the collateral order exception articulated in *Cohen v. Beneficial Industrial Loan Corporation, supra.* The Tenth Circuit held that this issue met the test for interlocutory review of *Midland Asphalt Corporation v. United States,* 489 U.S. 794 (1989), because a "grand jury vote total that is inadequate to support an indictment is such a fundamental defect; it causes the indictment no longer to be an indictment." 957 F.2d at 754-755.

The Tenth Circuit further ruled that "defendant's constitutional right not to be subject to trial without a grand jury indictment would be meaningless if defendants were unable to even attempt discovery of the relevant facts surrounding the grand jury indicting proceeding. . . . Therefore, we hold that we have jurisdiction to consider the merits of defendant's appeal." 957 F.2d at 755.

Since this Court's opinion in *Midland Asphalt Corporation v. United States,* only the Ninth and Tenth Circuits appear to have addressed, in reported decisions, appellate jurisdiction of interlocutory appeal of the denial of a motion seeking access to information about the grand jury charging process. Both circuits have held open the

possibility that this issue is appropriate for interlocutory appeal under certain circumstances.[4]

In contrast, the Sixth Circuit, in this case, effectively held that any interlocutory challenge to an indictment will not be reviewed. This decision is plainly in conflict with the standards set forth in *Midland Asphalt Corp. v. United States* and in *United States v. Deffenbaugh Industries, Inc.*.

C. The petition presents a substantial federal question.

The concept of collective guilt or guilt by association is repugnant to, and thoroughly rejected by, the Constitution. *See Ybarra v. Illinois,* 444 U.S. 85 (1979) (mere presence at scene of execution of search warrant does not

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[4] *See United States v. Shah,* 878 F.2d 272, 275 (9th Cir. 1989) (denial of a motion for discovery of grand jury proceedings, made on the basis of allegations of prosecutorial misconduct in those proceedings, held not appealable because such defects "fall short of such fundamental defects as would implicate the constitutional right to avoid trial absent a proper indictment", citing *Midland Asphalt); United States v. Schiff,* 874 F.2d 705, 706 (9th Cir. 1989) (motion to dismiss because of prosecutorial misconduct and motion for grand jury transcript not appealable; no discussion of what argument was proffered in support of motion for transcript); *United States v. Sherlock,* 887 F.2d 971, 972 (9th Cir. 1989) (no jurisdiction to hear interlocutory appeal of denial of motion to dismiss based on prosecutorial misconduct before the grand jury). See also *United States v. Tobias,* 836 F.2d 449, 452 (9th Cir. 1988) (holding that under *Mechanik v. United States,* a challenge to the grand jury charging process should have been pursued on interlocutory review rather than in an appeal after conviction).

subject an individual to personal search); *Kotteakos v. United States,* 328 U.S. 750 (1946) (evidence of criminal activity without relevance to defendant should not be introduced against him); *Enmund v. Florida,* 458 U.S. 782 (1982) (individual defendant's criminal intent is crucial to determination of the degree of defendant's criminal culpability).

Similarly, the historic function of the grand jury has been to protect individuals from mal-intentioned or unfounded prosecution. The grand jury stands "between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power." *Wood v. Georgia,* 370 U.S. 375 (1962). "The principal duty of the grand jurors is to determine whether or not probable cause exists to believe that a crime has been committed and to protect the accused individual from unfounded criminal prosecutions." *United States v. Calandra,* 414 U.S. 338 (1974).

The grand jury's historic function of protecting citizens from unwarranted indictment could easily be undermined and subverted by an oppressive prosecutor or sovereign by simply combining an innocent citizen in a multi-defendant indictment with one or more defendants as to whom probable cause existed and then demanding the single collective vote by the grand jury which occurred in the case at bar. Even Mother Teresa would be indicted and required to stand trial if combined with Saddam Hussein in an indictment on which a collective vote was required. The concept of probable cause is no less personal than the concept of guilt. A collective vote of probable cause is no less offensive than a collective jury vote at trial for guilt or innocence of multiple defendants.

The district court below held that "there is no requirement, either in Rule 6(f) or the Fifth Amendment that the grand jury take a separate vote as to each defendant on each count" (Memorandum, United States District Court for the Middle District of Tennessee, Case No. 3-92:00024, App. 5). The cases relied upon by the district court and those argued by the government in its response to the defendant's motion simply do not so hold.[5] Indeed,

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[5] The district court referred to four cases: *United States v. Felice*, 481 F.Supp. 79 (N.D. Ohio 1978) holds that grand jurors need not vote separately on each *count* of an individual defendant's indictment; *United States v. Bally Manufacturing Corp.*, 345 F.Supp. 410 (E.D. La. 1972) (holds that the vote of the grand jurors to indict is not required to be unanimous); *United States v. Richter Concrete Corp.*, 328 F. Supp. 1061 at 1060-1067 (S.D. Ohio 1971) (district court denied pretrial motion "to Dismiss Indictment as to any defendant not voted on by the Grand Jury", without discussion on this point and after making a finding that an *in camera* inspection of the grand jury record of the vote "does not indicate on its face . . . whether or not the three defendants were voted upon separately"); and *United States v. Zirpolo*, 288 F.Supp. 993 at 1014-1015 (D.N.J. 1968), rev'd on other grounds, 450 F.2d 424 (3d Cir. 1968) (motion alleged only that Rule 6 of the Federal Rules of Criminal Procedure required a showing that "the requisite number of Grand Jurors voted in favor of indicting each defendant on each count in which he was charged" – the court denied the motion, without citing authority, but after the filing of an affidavit by the prosecution which indicated, among other things, that the grand jury had specifically rejected a proposed indictment which contained in one count "a party named as a defendant which designation did not accord with the Grand Jury's recollection of the material presented before them").

The government also cited *United States v. Perkins*, 383 F.Supp. 922 (N.D. Ohio 1974) and *United States v. Winchester*, 407 F.Supp. 261 (D.Del. 1975), in its response to Petitioner's motion. These decisions each held that, as to a single-defendant

Petitioner is unaware of any reported decision specifically addressing the issue of whether the Fifth Amendment requires an individualized determination of probable cause by the grand jury.

The decision of the Sixth Circuit below misconstrued the teachings of *Mechanik* and *Midland Asphalt* and, by leaving an erroneous district court decision in place, denies citizens a significant constitutional right. Moreover, as discussed in part B, *infra.*, the Sixth Circuit Court Order is in direct conflict with the *Deffenbaugh* decision of the Tenth Circuit Court of Appeals.

CONCLUSION

For the reasons set forth herein, this petition for certiorari should be granted.

Respectfully submitted,

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indictment, grand jurors do not need to vote separately on each count of the indictment.

No. 92-5735

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)	
Plaintiff-Appellee,	)	ORDER
v.	)	
BRENDA RESHA	)	
Defendant-Appellant.	)	

BEFORE; KEITH and RYAN, Circuit Judges; and KRUPANSKY, Senior Circuit Judge.

The defendant appeals a district court order denying her motion to dismiss the indictment. The order denying her motion was entered on May 12, 1992, and on May 28, 1992, the defendant filed her notice of appeal. She has not yet been tried.

Under 28 U.S.C. § 1291, courts of appeals have jurisdiction only over final decisions of the district court. In a criminal case, this prohibits appellate review until after conviction and sentence. *Flanagan v. United States*, 465 U.S. 259, 263 (1984); *Berman v. United States*, 302 U.S. 211, 212 (1937). Generally, a district court order denying a defendant's motion to dismiss an indictment is not immediately appealable under § 1291. *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989); *United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263 (1982).

It is therefore ORDERED that this appeal is dismissed sua sponte for lack of appellate jurisdiction. Rule 9(b)(l), Local Rules of the Sixth Circuit. This order is without

prejudice to the defendant's right to perfect a timely appeal following entry of final judgment.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	CASE NO. 3:92-00024
vs.	)	
WALTER S. COHEN, et al.	)	
Defendants.	)	

MEMORANDUM

The Defendant Brenda Resha is charged with Conspiracy to Defraud the United States in violation of 18 U.S.C. § 1001. The government alleges that she was part of a scheme by persons associated with Tennessee Equity Capital Corporation to defraud the Small Business Administration by misapplying funds that were to be utilized on various small business concerns. Defendant Resha primarily is alleged to have kept and submitted fraudulent books and records regarding the small business concerns.

At present, Resha has filed three (3) motions in this matter which have not been addressed by the Court: They are the following:

(1) Motion to Dismiss the Indictment for Grand Jury Irregularities;

(2) Motion to Adopt the Motions of Call Codefendants; and

(3) Motion for Access to the Record of the Number Concurring in the Indictment.

For the following reasons the Defendant's motions hereby are DENIED.

II.

1. Motion to Dismiss the Indictment

The Fifth Amendment provides that "no person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury." U.S. Const.Amend.5. Under Rule 6(f) of the Federal Rules of Criminal Procedure, "an indictment may be found only upon the concurrence of twelve or more jurors." Fed.R.Crim.P.6(f). Neither of these sources, however, defines or addresses the process by which the Grand Jury must make and record its vote.

In this motion, the Defendant objects to the fact that the Grand Jury took a single vote on the indictment as a whole. The Defendant argues that, when faced with a multiple defendant indictment, the Grand Jury must make a separate finding of probable cause as to each defendant on each count. Specifically, Resha argues that because the Supreme Court has ruled that in the trial context guilt must be personal and separate consideration is essential, *Scales v. United States*, 367 U.S. 203 (1961), the same rules ought to apply to the lower standard of probable cause used by the Grand Jury. She asserts that a collective vote divested her of her Fifth Amendment right to a personal finding of probable cause and created a substantial risk that she was "indicted by association." In other words, she contends that the voting method potentially led the grand jurors to believe that to indict one Defendant they had to indict all three.

In response, the government asserts that the law is well-settled that a grand jury is under no obligation to conduct a separate vote for each defendant on each count on a multiple defendant indictment. The government argues that the Fifth Amendment does not address voting procedures, and that Rule 6(f) and the case law interpreting it require only that twelve or more jurors concur in the finding. Moreover, the Government points out that, to protect the secrecy of the grand jury process, information including voting records should only be disclosed upon a showing of "particularized need." *United States v. Lang*, 644 F.2d 1232 (7th Cir.) *cert. denied*, 454 U.S. 870 (1981). Under the facts of this case, it maintains, the Defendant has not made such a showing.

This Court finds that there is no requirement, either in Rule 6(f) or the Fifth Amendment that the grand jury take a separate vote as to each defendant on each count. The Defendant in her Reply in Support of her Motion to Dismiss the Indictment concedes that Rule 6 does not require such precision. Fed. R. Crim.P.6. In fact, the cases treating this issue under Rule 6 and the Fifth Amendment have all found that no such requirement exists. *See United States v. Felice*, 481 F.Supp. 79, 82 (N.D. Ohio 1978); *United States v. Richter Concrete Corps.*, 328 F.Supp 1061, 1067 (S.D. Ohio 1971) (interpreting both Rule 6 and the Fifth Amendment); *United States v. Bally Mfg Corp.*, 345 F.Supp. 410, 421 (E.D. La. 1972); *United States v. Zirpolo*, 288 F.Supp. 993 (D.N.J.), *rev'd on other grounds*, 450 F.2d 424 (1968). The only requirement that this Court must enforce is that twelve or more jurors "concur in the finding."

Based on an in-camera inspection of the Record of Grand Jurors Concurring, this Court is satisfied that no Fifth Amendment or Rule 6 violation occurred. The Defendant's Motion to Dismiss the Indictment Based on Grand Jury Voting Irregularities therefore is DENIED.

2. Motion for Access to the Record of Number Concurring

Pursuant to Rule 6(f), the grand jury can return an indictment only upon a concurrence of twelve or more jurors. Fed. R. Crim.P. 6(f). Under Rule 6(c), the foreperson must sign and deliver to the Clerk of the Court a record indicating the number of jurors that concurred in the finding. Fed. R. Crim. P. 6(c). Rule 6(e)(3)(C)(ii) gives this Court the discretion to disclose the record of number concurring to the defendant for use in connection with a Motion to Dismiss the Indictment. Fed. R. Crim. P. 6(e)(3)(C)(ii).

The Defendant has requested that she be given an opportunity to inspect the voting record to review the number concurring. Under *United States v. Bullock,* 448 F.2d 728 (5th Cir. 1971), the Defendant argues that she is entitled to either the record itself or a substitute form of proof. The government responds that the Record of Number Concurring has been filed with the Clerk. Moreover, the government insists that the Defendant has not made a showing of need strong enough to supplant the grand jury's need for secrecy.

Having reviewed the parties' arguments, it is clear that Defendant's contention is without merit. Rule 6(e)(2) provides that proceedings before the grand jury are not to

be disclosed except under extremely limited circumstances. Moreover, the Supreme Court in *United States v. Proctor & Gamble,* 356 U.S. 677 (1958) reiterated the necessity for secrecy in grand jury proceedings. The Court joins the view of most courts that grand jury secrecy should only be frustrated upon a substantial showing of need. Under the facts of this case, however, the Defendant has not demonstrated the requisite need. On the contrary, she has made what other courts have termed "unsubstantial allegations of voting irregularity" amounting to "pure conjecture". *United States v. Ruiz,* 702 F.Supp. 1066 (S.D.N.Y. 1989). As stated earlier, this Court has reviewed the Record of Number Concurring and is fully satisfied that no violations occurred. The Defendant's Motion for Access to the Record of the Number of Persons Concurring in the Finding of the Indictment must therefore be DENIED.

3. Motion to Adopt Co-Defendant's Motions

While ordinarily this would be a fairly "routine" motion, with respect to this case the Court finds that is unwarranted. It is unwarranted because the co-defendants have not filed any motions that would apply to Defendant Resha. Consequently, the Defendant's Motion to Adopt the Motions Filed By All Co-Defendant's is hereby DENIED.

III.

For the foregoing reasons the Defendant's Motions are hereby DENIED. An Order in accord shall be entered. This matter is set for trial on September 15, 1992.

/s/ Thomas A. Wiseman
Thomas A. Wiseman, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	CASE NO.
vs.	)	3:92-00024
	)	
WALTER S. COHEN, et al.	)	
	)	

ORDER

For the reasons stated in the accompanying Memorandum, the Defendant Resha's Motion to Dismiss the Indictment, Motion for Access to Number Concurring, and Motion to Adopt Co-Defendants' Motions are DENIED.

IT IS SO ORDERED.

/s/ Thomas A. Wiseman
Thomas A. Wiseman, Jr.
U.S. District Judge

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
NOV 13 1992
OFFICE OF THE CLERK

No. 92-475

In the Supreme Court of the United States

OCTOBER TERM, 1992

BRENDA RESHA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court order denying petitioner's motion to dismiss the indictment because the jury failed to take a separate vote as to each defendant, and denying petitioner's motion for access to the record of the grand jury's vote, is immediately appealable.

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In the Supreme Court of the United States

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No. 92-475

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported, but the judgment is noted at 966 F.2d 1455 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1992. The petition for a writ of certiorari was filed on September 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the Middle District of Tennessee returned an indictment charging petitioner and two co-defendants with conspiring to defraud the United States, in violation of 18 U.S.C. 371. The district court denied petitioner's motions to dismiss the indictment and to grant petitioner access to the record of the grand jury vote on the indictment. The court of appeals dismissed petitioner's interlocutory appeal for want of jurisdiction. Pet. App. 1a-2a.

1. The first count of the indictment charges petitioner and two co-defendants with conspiracy to make false statements to the Small Business Administration (SBA), to misapply assets of a small business investment company licensed by the SBA, and to deceive SBA investigators. The other seven counts of the indictment charge petitioner's co-defendants with various substantive offenses. The grand jury voted to return the indictment without taking a separate vote as to each defendant or as to each count.

The district court denied petitioner's motion to dismiss the indictment on the ground that the grand jury did not vote separately as to each defendant. Pet. App. 3a-6a. The court concluded that neither the Fifth Amendment nor Fed. R. Crim. P. 6(f) imposes such a requirement. Pet. App. 5a (collecting authorities). The court concluded that the only requirement as to voting is that 12 or more grand jurors must concur in the finding of the indictment. The court conducted an in camera inspection of the grand jury records and determined that "no Fifth Amendment or Rule 6 violation occurred." *Id.* at 6a.

The district court also denied petitioner's motion for access to the grand jury's record of its voting. The court noted that grand jury proceedings may not be disclosed "except under extremely limited circumstances." Pet. App. 6a-7a (citing Fed. R. Crim. P. 6(e)(2); *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677 (1958)). The court found no need for disclosure in this case, because petitioner had made only "unsubstantial allegations of voting irregularity amounting to pure conjecture." Pet. App. 7a (citation and internal quotation omitted). Moreover, the court reviewed the grand jury records and was "fully satisfied that no violations occurred." *Ibid.*

2. The court of appeals dismissed petitioner's interlocutory appeal for lack of appellate jurisdiction. Pet. App. 1a-2a. The court concluded that petitioner's appeal was governed by the general rule that "a district court order denying a defendant's motion to dismiss an indictment is not immediately appealable under [28 U.S.C.] 1291." *Id.* at 1a (citing *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794 (1989); *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982)). The court therefore dismissed the appeal "without prejudice to the [petitioner's] right to perfect a timely appeal following entry of final judgment." Pet. App. 2a.

ARGUMENT

1. Petitioner contends (Pet. 9-11) that the court of appeals' decision conflicts with this Court's decision in *Midland Asphalt Corp.* v. *United States*, *supra*. Contrary to petitioner's contention, *Midland Asphalt* strongly supports the court of appeals' decision in this case.

a. In *Midland Asphalt*, the Court held that a district court order denying a defendant's motion to dismiss an

indictment for an alleged violation of Fed. R. Crim. P. 6(e) is not immediately appealable. The Court observed that federal courts of appeals "have jurisdiction of appeals from all final decisions of the district courts * * * except where a direct review may be had in the Supreme Court." 489 U.S. at 798 (quoting 28 U.S.C. 1291). In criminal cases, a final judgment is not entered "until after conviction and imposition of sentence." 489 U.S. at 798.

The Court has recognized "a narrow exception to the normal application of the final judgment rule, which has come to be known as the collateral order doctrine." 489 U.S. at 798; see *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In criminal cases, the collateral order exception has been applied "with the utmost strictness." 489 U.S. at 799 (quoting *Flanagan* v. *United States*, 465 U.S. 259, 265 (1984)). "To fall within the limited class of final collateral orders, an order must (1) 'conclusively determine the disputed question,' (2) 'resolve an important issue completely separate from the merits of the action,' and (3) 'be effectively unreviewable on appeal from a final judgment.'" 489 U.S. at 799 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

In *Midland Asphalt*, the Court had "little difficulty" concluding that an order denying a motion to dismiss an indictment for an alleged violation of Fed. R. Crim. P. 6(e) does not meet the stringent requirements of the collateral order doctrine. 489 U.S. at 799. If Rule 6(e) violations are reviewable on appeal, they do not meet the requirement that the order be "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468. If, on the other hand, Rule 6(e) violations are rendered harmless by a petit jury's verdict of guilty,

the issue is not "completely separate from the merits of the action." *Ibid.* (That is so because the harmless error rule will apply only if the purpose of Rule 6(e) is to "protec[t] against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty." 489 U.S. at 800 (quoting *United States* v. *Mechanik*, 475 U.S. 66, 70 (1986)).

The Court in *Midland Asphalt* expressly rejected the argument that a defendant has a right not to be tried on an indictment returned by a grand jury influenced by the government's violation of Rule 6(e). The Court concluded that a "right not to be tried" must "rest[] upon an explicit statutory or constitutional guarantee that trial will not occur." 489 U.S. at 801. Because neither the Grand Jury Clause of the Fifth Amendment nor Rule 6(e) provides such a guarantee, an alleged violation of Rule 6(e) is not immediately appealable. The Court concluded that "[o]nly a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried." 489 U.S. at 802.

b. Petitioner contends (Pet. 9-10) that she is entitled to interlocutory appellate review of the question whether the grand jury was required to make an "*individual* determination * * * of probable cause." *Id.* at 9. Neither the Constitution nor the Federal Rules of Criminal Procedure require the grand jury to take a separate vote as to each defendant or each count of an indictment. Petitioner concedes (Pet. 16) that she is aware of no judicial decision recognizing such a requirement.

Even if there were such a voting rule, *Midland Asphalt* makes it plain that an alleged violation of the rule

would not be subject to interlocutory appellate review. The Court's reasoning in *Midland Asphalt* applies: If petitioner can raise the issue on appeal from a conviction, it is not "effectively unreviewable." And if any error is rendered harmless by a guilty verdict, the issue is not "completely separate from the merits." Moreover, because neither the Constitution nor the Federal Rules specify the procedure that petitioner advocates—let alone create a right not to be tried if the procedure is not followed—an error could hardly be "so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment." 489 U.S. at 802.

c. Petitioner also contends (Pet. 10) that "a district court order refusing to disclose whether or not a sufficient number of grand jurors have voted to concur in the issuance of the indictment" is immediately appealable. This case does not present that question. The district court disclosed to petitioner that a sufficient number of grand jurors concurred in the indictment. See Pet. App. 6a-7a. To the extent that petitioner is contending that she is entitled to review the grand jury voting record despite the district court's assurance that a sufficient number of grand jurors concurred in the indictment, the issue is not immediately appealable for the same reasons that the denial of petitioner's motion to dismiss the indictment is not immediately appealable. In addition, the issue that petitioner raises is not a significant one and therefore fails to satisfy the "importance" requirement of the collateral order doctrine. See *Coopers & Lybrand*, 437 U.S. at 468.

2. Petitioner contends (Pet. 11-13) that the court of appeals' decision conflicts with *United States* v. *Deffen-*

baugh Indus., Inc., 957 F.2d 749 (10th Cir. 1992). Any tension between *Deffenbaugh* and the unpublished decision in this case does not merit further review.

In *Deffenbaugh*, the defendants took an interlocutory cross-appeal challenging the district court's refusal to grant them access to the record of the number of jurors concurring in the indictment. The court of appeals reasoned that "[a] grand jury vote total that is inadequate * * * causes the indictment no longer to be an indictment," and therefore is effectively unreviewable on appeal. 957 F.2d at 755. The court of appeals therefore held that "substantial claims attacking the technical validity of the grand jury charging process are subject to interlocutory appeal under the *Cohen* exception." *Ibid.* The court further concluded that "defendants' constitutional right not to be subject to trial without a grand jury indictment would be meaningless if defendants were unable to even attempt discovery of the relevant facts." *Ibid.* On the merits, however, the court of appeals concluded that "defendants are entitled to the assurance of the district judge that the judge has inspected the report and it contains twelve or more votes to indict. But anything more, except upon a showing of particularized need, would negate Rule 6(c)'s requirement of secrecy absent an 'order of the court.'" 957 F.2d at 757.

Petitioner would have fared no better if she had been indicted in the Tenth Circuit. An interlocutory appeal must raise a "colorable" claim. See *Richardson* v. *United States*, 468 U.S. 317, 322 (1984); *United States* v. *MacDonald*, 435 U.S. 850, 862 (1978); *Abney* v. *United States*, 431 U.S. 651, 659 (1977). Following *Deffenbaugh*, it is clear that a defendant who has made no showing of particularized need has no right to inspect the grand

jury voting record if the district court has inspected the record in camera and determined that an adequate number of grand jurors voted in favor of the indictment. Consequently, the Tenth Circuit is likely to have dismissed petitioner's interlocutory appeal as frivolous.

Even if the Tenth Circuit would have reached the merits of petitioner's claim, it would not have granted her any relief. Petitioner has received "the assurance of the district judge that the judge has inspected the report and it contains twelve or more votes to indict." 957 F.2d at 757. That is all she would be entitled to under *Deffenbaugh*. Accordingly, no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1992